IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

TRANSIT CASUALTY COMPANY, ET AL., *Petitioners,*

v.

SECURITY TRUST COMPANY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Transit Casualty Company, *et al.*,[1] pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals

[1] In addition to Transit Casualty Company, the following parties are petitioners: Charter National Insurance Company; Farmers Elevator Mutual Insurance Company; Agway Insurance Company; LaSalle Casualty Company; Mid-America Fire & Marine Insurance Company, and Mutual Boiler and Machinery Insurance Company.

for the Fifth Circuit in the above-entitled case entered on April 1, 1971, in favor of respondents, Security Trust Company, *et al.*[2]

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Southern District of Florida have not been officially reported and are printed as Appendix A hereto. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court have been officially reported at 441 F. 2d 788, and are printed as Appendix B hereto. The opinion of the Fifth Circuit denying both rehearing and rehearing *en banc* has not been officially reported and is printed as Appendix C hereto.

JURISDICTION

The United States District Court for the Southern District of Florida denied petitioners' Motion for Relief of Judgment on November 19, 1969 (App. A). On April 1, 1971, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the District Court's judgment (App. B). Petitioners filed a timely motion for rehearing and suggestion for rehearing *en banc* which was denied by the Fifth Circuit on May 28, 1971 (App. C). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[2] In addition to Security Trust Company, the following parties are respondents: the State Treasurer and, ex officio, Insurance Commissioner of the State of Florida, as substitute Receiver of McKinley & Company, and the Deputy Insurance Commissioner of the State of Florida, as Deputy Receiver of McKinley & Company.

QUESTIONS PRESENTED

1.(a) Should the view of the Ninth Circuit or the conflicting view of the Fifth and Second Circuits prevail on the issue of whether Rules 60(b)(1) and 60(b)(6) of the Federal Rules of Civil Procedure are mutually exclusive?

(b) Should a motion for relief of judgment under Rule 60(b) of the Federal Rules of Civil Procedure, filed more than one year after the original judgment was entered and yet within one year from a substantially modified second judgment, and alleging a reason for relief which has some characteristics similar to those enumerated in Rule 60(b)(1) and other characteristics which are not specifically mentioned anywhere in Rule 60(b), be considered under the "any-other-reason" provisions of Rule 60(b)(6), or be limited to consideration under Rule 60(b)(1) and therefore rejected as untimely?

2. Despite the purpose and intent of Rule 60(b) of the Federal Rules of Civil Procedure, may a class comprising over 1,500 individual and corporate plaintiffs be barred forever from obtaining a hearing on the merits of a $1,000,000 claim for gross negligence, mismanagement, and constructive fraud, because the trial counsel for the named plaintiffs, defendants' trial counsel, and an associate District Judge all misinterpreted the legal significance of a procedural order entered by the Chief District Judge as part of what the Fifth Circuit characterized as a "housekeeping operation"?

RULE INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representa-

> tive from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) * * * not more than one year after the judgment, order, or proceeding was entered or taken. * * *

STATEMENT OF THE CASE

For over five years, petitioners have vigorously, unceasingly, and thus far unsuccessfully attempted to obtain a hearing on the merits of two complaints seeking more than $1,000,000 for gross negligence, mismanagement, and constructive fraud. They have been denied that hearing on the merits because the Fifth Circuit below adopted a construction of Rule 60(b) prevailing in the Second Circuit rather than the admittedly conflicting and broader construction of that rule adopted by the Ninth Circuit and numerous other federal courts. Unless this Court grants certiorari to resolve these conflicting interpretations of Rule 60(b), petitioners' cause of action will be extinguished permanently.

On January 28 and February 11, 1966, petitioners Transit Casualty Company ("Transit Casualty") and Charter National Insurance Company ("Charter National") filed two related complaints in the United States District Court for the Southern District of Florida against respondent Security Trust Company ("Security Trust") and respondents Insurance Commissioner of the State of Florida and his Deputy (R. 12-76, 261-283).[3] Both complaints were brought as

[3] The designation "R." refers to both the first volume (pp. 1-319) and the second volume (pp. 320-467) of the printed record below.

class actions; Transit Casualty and Charter National were the only named plaintiffs (R. 12, 261). The rest of the class consisted of twenty-four other insurance companies, all of whom were listed in an exhibit to the complaints (R. 13, 59-60, 176, 262). Plaintiffs were all creditors of a Florida insurance company, McKinley & Company ("McKinley"), which had become insolvent (R. 14-15, 23). Jurisdiction was based on diversity of citizenship and the requisite jurisdictional amount (R. 13-14, 261-262).

The complaints charged that Security Trust, in various legal capacities including sole stockholder and trustee of McKinley (R. 16, 263), had engaged in a series of acts and omissions constituting gross negligence, mismanagement and constructive fraud to the great damage of plaintiffs and their class (R. 16, 25, 263, 272).

Security Trust was charged with the following acts and omissions, among others:

—maintaining McKinley's books and accounts in a manner which did not accurately reflect the company's transactions in disregard of the advice of an independent certified public accountant, contained in a 99-page report (R. 16, 26).

—violating its duty and obligations as a trustee by permitting McKinley to commingle premium funds which were required by contracts with petitioners to be maintained in separate trust accounts (R. 18).

—failing to remove the president of McKinley from office after receiving written notice from Lloyds of London that the president was making false and misleading statements concerning losses being suffered by insurance companies on business being written through McKinley (R. 19).

—permitting McKinley to pay exorbitant and unconscionable salaries and bonuses to executives and

employees of the company, including certain bonuses $88,000 in excess of the amounts authorized by the McKinley Board of Directors (R. 20-21).

—permitting McKinley to make unsecured advances and loans to its officers and employees totalling over $125,000 (R. 21).

—permitting certain executives of McKinley to engage in a conspiracy pursuant to which they agreed to provide false data on losses suffered by McKinley in order to obtain renewal of McKinley's contracts with various London insurance companies (R. 26-27).

—permitting the chairman of the Board of Directors of McKinley to divert trust funds belonging to petitioners in amounts in excess of $390,000 for purposes completely disassociated from petitioners' affairs (R. 30).

—failing to act on reports received from London insurance brokers advising that McKinley's reported losses were in error in various percentages ranging between 150 and 350 per cent (R. 30).

Plaintiffs asserted that the aforementioned actions and omissions of Security Trust, and many other specified actions and omissions, had damaged the class represented by the named plaintiffs in an amount in excess of $1,000,000 including interest and costs (R. 24, 25, 35).

On June 30, 1966, after respondent Security Trust had answered the complaints and the parties had begun various forms of discovery, petitioners' attorneys learned that Security Trust's attorneys had written letters directly to certain of those class members who had not been named as plaintiffs but whose names had been listed in the aforementioned exhibit to the com-

plaints (R. 101-102). These letters contained the following paragraph:

> This letter is to inquire whether your company has knowledge of this litigation or has given its consent to be named as a member of [the] alleged class. Unless I hear from you promptly that your company does not have such knowledge and has not given its consent, it will be necessary in the near future to take the depositions of your officers and possibly your directors. [R. 104.]

Petitioners' attorneys considered these letters a breach of ethics and immediately sent a telegram to Security Trust's counsel which requested that "you cease and desist writing and communicating directly or indirectly with clients represented by this firm" (R. 105).

In attempting to explain their conduct, Security Trust's lawyers wrote to petitioners' lawyers that same day, June 30, 1966, and sent a copy of their letter to Chief District Judge Fulton (R. 105-106). In that letter, Security Trust's attorneys asserted:

> Ordinarily, members of a class claimed to be represented by named plaintiffs are only quasi-parties, and therefore may not be subject to the discovery rules relating to the officers, directors and managing agents of corporate parties.
>
> If you will show me written authorizations from the members of the class for the filing of these suits or your own assurance of representation sufficient to insure that their officers, directors and managing agents will submit to discovery without service of subpoena, I will be glad to withdraw my letters promptly. [R. 106.]

The next day, July 1, 1966, petitioners' attorneys filed a motion "to enjoin and prohibit defendants' attorneys

from communicating directly or indirectly with plaintiffs represented herein by counsel and from attempting to intimidate and threaten said plaintiffs and from obstruction of justice" (R. 101-103). After this motion was filed, the parties continued to engage in discovery. On September 6, 1966, Security Trust answered the motion (R. 172-175), denied any unethical conduct, and stated in part:

> 6. If the only basis for the claim of the attorney-client relationship arises by reason of the alleged class membership, the defendant submits that it and its counsel have the right and freedom to communicate directly with such non-parties * * *. [R. 173.]
>
> 7. If, on the other hand, the firm of Blackwell, Walker & Gray has by contract the authority to represent any or all of the alleged class members, then as to those so represented, counsel for defendant concede that there should be no communication. It is submitted that Blackwell, Walker & Gray should, therefore, be required to disclose to the Court and counsel the nature and basis of their claim of attorney-client relationship with the non-party class members so that all, Court and counsel, will be advised as to how to proceed in the litigation with regard to such non-parties. [R. 173-174.]

Eight days later, on September 14, 1966, Chief District Judge Fulton entered an order ruling on several contested motions between the parties, including petitioners' motion for an injunction (R. 176-181). This crucial order provided:

> At the hearing upon the foregoing Motions it was made to appear that counsel for Plaintiffs has also been retained to represent other parties who constitute the alleged class.

> Thereupon, it is,
> Ordered and Adjudged as follows:
> 1. Plaintiffs shall within ten (10) days hereafter amend their complaints so as to include as parties Plaintiff all members of the alleged class who have retained counsel for the Plaintiffs to represent them * * *. [R. 178-179.]

Two days after this order was entered, on September 16, 1966, the United States District Court for the Southern District of Florida, *sua sponte* and without giving any reasons, transferred the case from Chief Judge Fulton to newly-appointed Judge Atkins (R. 181-182), who heard all subsequent proceedings. As will be shown below, this fact became vital in the ultimate outcome.

On September 19, 1966, petitioners moved to modify Chief Judge Fulton's September 14, 1966 order to permit an interlocutory appeal, contending (1) that Chief Judge Fulton's order would require them to name as plaintiffs all the members of the class, and (2) that the naming of all class members would divest the District Court of jurisdiction because several class members were Florida corporations and thus diversity of citizenship would be destroyed (R. 182-184).[4] As shown below, this interpretation of the legal requirements of this order was wrong, but it was shared at the time by both defense counsel and Judge Atkins. Petitioners' requests for modification and for a stay were denied on September 23, 1966 (R. 187).

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[4] Petitioners Transit Casualty and Charter National, neither of which was a Florida corporation, were particularly anxious to maintain the case in the Federal District Court rather than in a Florida state court to eliminate even the possibility that a respondent Florida corporation, the Florida Insurance Commissioner, or his Deputy might receive partial treatment (R. 418-419).

On October 5, 1966, petitioners filed a new motion to amend Chief Judge Fulton's September 14, 1966 order, a new request for a stay, and a motion to amend their complaints (R. 190-198). This new motion again alleged that the September 14 order required petitioners to name as plaintiffs every class member and that doing so would oust the court of jurisdiction. But most importantly, the new motion pointed out that even if there had previously been any doubt about the practicality of naming every class member, it was now clearly impractical in view of the amended complaints annexed to the motion, which showed that the class consisted of 37 companies in addition to the two named plaintiffs and 1,621 individuals (R. 191). The newly named class members were all English companies and individuals—comprising a Lloyds of London syndicate—who were also creditors of McKinley (R. 193-196). Without comment, Judge Atkins granted the motion to amend the complaints but denied the renewed motion to amend Chief Judge Fulton's order (R. 209-210).

Petitioners then sought a writ of prohibition and mandamus from the Fifth Circuit seeking to set aside that portion of Chief Judge Fulton's September 14 order which they felt unreasonably required them to name every class member as a party and which they felt would oust the District Court from its jurisdiction. On February 9, 1967, the Fifth Circuit, in a two-page *per curiam* opinion, declined to issue the requested writs, stating:

> Irrespective of the correctness of the order below, it is apparent that this case is not in an appropriate stage for appellate review. * * * It is not clear what the precise effect of the order will be on the outcome of the litigation * * *.

> Without in any manner * * * undertaking to determine whether the order complained of was correctly or incorrectly entered * * * we deny the relief prayed for * * *. [*Transit Casualty Co.* v. *Atkins*, 372 F. 2d 441, 442 (5th Cir. 1967).]

On May 9, 1967, petitioners filed a further amendment to their complaints adding seven named plaintiffs to the original two named plaintiffs (R. 221-224), and amending the enumerated class to consist of 1,554 additional companies and individuals (R. 223). Respondents then moved on May 18, 1967 to dismiss the complaints for lack of federal subject matter jurisdiction or, in the alternative, for failure to comply with the September 14, 1966 order. In support of their motion, respondents referred to a portion of petitioners' brief in support of writs of mandamus and prohibition, in which petitioners had stated that "it is undisputed" that several of the companies whose joinder would be required under this ruling were Florida corporations (R. 226). Referring to petitioners' latest amendment to their complaints, respondents erroneously stated that this amendment did not comply with the September 14, 1966 order because the amendment did not join as additional plaintiffs several Florida companies "which the plaintiffs had represented to [the court] and the Fifth Circuit as having retained counsel for the plaintiffs in this suit" (R. 226). Respondents agreed with petitioners that joinder of these Florida companies would oust the court of jurisdiction (R. 226).

On July 13, 1967, Judge Atkins dismissed petitioners' complaints with prejudice for failure to comply with Chief Judge Fulton's order of September 14, 1966 (R. 229-231), holding, in part, as follows:

> The Amendment to the Complaint[s] filed on May 9, 1967 in an effort to comply with the order of

> September 14, 1966, conspicuously fails to include three Florida corporations which the plaintiffs have represented to [the court] * * * to comprise members of the alleged class which must be named pursuant to the Order of September 14, 1966, since they were legally represented by counsel for the plaintiffs. [R. 229-230.]

On July 17, 1967, petitioners moved to vacate, or in the alternative to amend, the order of dismissal, pursuant to Rule 59 of the Federal Rules of Civil Procedure (R. 231-236). This motion again emphasized the unfairness of being required by the court to name every member of the class as a party plaintiff and to name as parties plaintiff residents of Florida who would oust the District Court of jurisdiction.

This Rule 59 motion came on for oral argument before the District Court on July 24, 1967 (R. 239-259). At this argument, petitioners' attorneys assured the court that their relationship with the Florida companies which were members of the class was no different from their relationship with all other members of the class who were not named plaintiffs:

> The Court:
>
> You do represent those three Florida corporations, do you not?
>
> Mr. Larkin:
>
> As members of the class, definitely, Judge. I mean, just as we represent the 1600 underwriters at Lloyds who have said in response to the notice that went out, "we want to be members of this class, and we want this lawsuit brought, and we are content to be bound by whatever the outcome is," so, yes, we represent them.
>
> We are not retained by them. [R. 248.]

However, the court denied the Rule 59 motion (R. 236-237, 259).

On June 28, 1968, the Fifth Circuit affirmed the District Court's dismissal in a four-sentence *per curiam* opinion which stated simply, "we agree with the order of dismissal by the district court, but vacate that part of the order making the dismissal with prejudice and remand with instructions to enter the order without prejudice." *Transit Casualty Co.* v. *Security Trust Co.*, 396 F.2d 803.[5] At this juncture, limitations had run against any new action which might be brought between the parties. On August 29, 1968, the Fifth Circuit denied a petition for rehearing, and issued another *per curiam* opinion stating, "appellants overlook that really the only issue on appeal is the compliance vel non with the District Court's order of September 14, 1966, and, having found a failure of compliance on the part of appellants, the District Court's judgment of dismissal was affirmed * * *." *Transit Casualty Co.* v. *Security Trust Co.*, 399 F.2d 665. This Court denied certiorari on January 13, 1969, perhaps because of the interlocutory nature of the Fifth Circuit ruling. 393 U.S. 1024.

On April 24, 1969, petitioners sought leave from the Fifth Circuit to file a motion in the District Court pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from the judgment dismissing their complaints, and concurrently lodged that motion with the District Court (R. 321, 340-347). The Fifth Circuit granted leave to proceed (R. 338).

The central thrust of the Rule 60(b)(6) motion was that plaintiffs' counsel, defendants' counsel, and Judge Atkins had all misinterpreted Chief Judge Ful-

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[5] A new order dismissing without prejudice was entered by the District Court in compliance with the Fifth Circuit's mandate on September 10, 1968 (R. 333-334).

ton's September 14, 1966 order. Under this shared erroneous interpretation, the order had been read to require the naming of the aforementioned Florida corporations and perhaps some other parties as plaintiffs. Since the Florida companies had not been named as plaintiffs, Judge Atkins had concluded that plaintiffs had disobeyed Chief Judge Fulton's order, and accordingly he dismissed the complaints. However, petitioners now maintained that the order did *not* require that the Florida corporations or any other particular parties be named, but only that all parties who had retained plaintiffs' law firm be named. Since, in fact, all parties who had retained plaintiffs' law firm had at *all* times prior and subsequent to September 14, 1966 been named as plaintiffs, the September 14 order had been complied with continuously, albeit unwittingly. Thus, the correct legal interpretation of Chief Judge Fulton's order distinguished between those class members who were *represented* by plaintiffs' law firm—the entire class—and those class members who had *retained* that law firm—the named plaintiffs. Since all parties and Judge Atkins had failed to recognize this legal distinction in Chief Judge Fulton's order, it would be unfair and inequitable not to amend the newly-entered judgment of "dismissal without prejudice" so as to read, "dismissal without prejudice, and with leave to amend the complaints.". In the absence of such an amendment of the District Court's judgment, plaintiffs would have to institute new lawsuits, and such new suits now would be barred by the statute of limitations, which had run two years previously (R. 340-345, 353-375).

Despite these arguments, the District Court denied the request for relief in a short opinion and order entered on November 19, 1969 (Appendix A hereto).

The court held that plaintiffs were not entitled to relief under Rule 60(b)(6) because, in the court's opinion, plaintiffs' claim for relief was based upon the "typical case of mistake and nothing more"—a ground for relief exclusively dealt with by Rule 60 (b)(1). The court further held that relief under the latter rule was barred as untimely because it had been requested more than one year after the entry of the original order of dismissal with prejudice on July 12, 1967. According to the District Court, the one-year-limitations period commenced to run from the date of this original order, not from the date of the newly-entered order dismissing without prejudice on September 10, 1968.[6]

On appeal, the Fifth Circuit affirmed the District Court's rulings, stating that:

> [S]ome eulogy may be appropriate, inasmuch as our decision will apparently deal a fatal blow to a cause which set forth over four years ago to recover damages in excess of $1,000,000 * * * and has not once been brought to court on the merits.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to rectify what has aptly been described as the "manifest * * * confusion of opinion and muddled application" of Rules 60(b)(1) and 60(b)(6) of the Federal Rules of Civil Procedure by the lower federal courts.[7]

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[6] In its opinion, the District Court erroneously stated that Plaintiffs' Rule 60(b) motion was filed on July 1, 1969. In fact, as noted above, the motion was filed on April 24, 1969 (R. 321, 340-347).

[7] Comment, *Equitable Power of a Federal Court To Vacate a Final Judgment For "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 Mo. L. Rev. 427, 437, 439 (1968).

The confusion has stemmed largely from the "plethora" of opinions (seven in all) issued by this Court when it last construed these rules over twenty years ago in *Ackermann* v. *United States*, 340 U.S. 193 (1950) (5 to 3 decision), and *Klapprott* v. *United States*, 335 U.S. 601 (1949) (5 to 4 decision). The opinions in the instant case demonstrate why this Court should address itself to a problem it has not discussed for so long, since, as one commentator put it even three years ago:

> The lack of clarification from the source of the confusion shrouds Rule 60b in the same cloak of mystery and uncertainty that obscured its common law antecessors, thereby frustrating the very purpose of its existence. This situation has prevailed for nearly twenty years, hopefully it will not persist much longer.[8]

One result of the confusion over the meaning of Rule 60(b) has been a conflict in circuits. The Second Circuit observed as recently as April 2, 1971, in a case which is now pending before this Court, that its construction of the relationship between Rules 60(b)(1) and 60(b)(6) was in direct conflict with that adopted in the Ninth Circuit.[9] If the Fifth Circuit in the instant case had followed the Ninth Cir-

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[8] Comment, *supra* note 7 at 441. Petitioners note that they do not necessarily agree with the methods of clarification of this situation suggested by the commentator, but completely concur with his conclusion that this Court should resolve the confusion at the earliest possible moment.

[9] *Compare United States* v. *Erdoss*, 440 F.2d 1221, 1223 (2d Cir. 1971), *pet. for cert. filed sub nom. Horvath* v. *United States*, No. 71-2, June 30, 1971, *with Patapoff* v. *Vollstedt's, Inc.*, 267 F.2d 863 (9th Cir. 1959).

cuit rather than the Second Circuit,[10] it would have had to hold that petitioners' motion could properly be maintained under Rule 60(b)(6). However, on the authority of the Second Circuit construction of these rules, the Fifth Circuit below held instead that petitioners' motion could only be considered under Rule 60(b)(1).[11]

This conflict in the federal courts has been particularly apparent in those many instances in which a party has moved under Rule 60(b) for relief from a judgment more than one year after the judgment was entered, alleging a reason for relief which has *some* characteristics similar to those enumerated in Rule 60(b)(1), such as "mistake" or "excusable neglect," but which has *other* characteristics which are *sui generis* and therefore fall under Rule 60(b)(6). In these circumstances, the Second and Fifth Circuits would bar relief, but many other federal courts have granted relief.[12] In the view of these latter courts,

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[10] The Fifth Circuit below expressly relied on the Second Circuit's opinion in *Rinieri* v. *News Syndicate Co.*, 385 F.2d 818 (2d Cir. 1967), to support its holding that "the reason for relief set forth in Rule 60(b)(1) cannot be the basis for relief under Rule 60(b)(6)." In *United States* v. *Erdoss*, *supra*, the Second Circuit expressly reaffirmed its *Rinieri* ruling.

[11] The rationale of the Fifth Circuit in this case also conflicts with the analysis of Rule 60(b)(6) contained in one of its own prior opinions, *Bros., Inc.* v. *W. E. Grace Mfg. Co.*, 320 F.2d 594, 609 (5th Cir. 1963) ("While the circumstances reflected by all of these papers bear many of the earmarks of a mere plea for reopening for newly discovered evidence under (2) or fraud under (3), it is something more").

[12] *E.g.*, *L. P. Steuart, Inc.* v. *Matthews*, 117 U.S. App. D.C. 279, 329 F.2d 234, *cert. denied*, 379 U.S. 824 (1964); *United States* v. *Backofen*, 176 F.2d 263 (3d Cir. 1949); *Transport Pool Div. of Cont. Leas., Inc.* v. *Joe Jones Truck. Co., Inc.*, 319 F. Supp. 1308 (N.D. Ga. 1970); *King* v. *Mordowanec*, 46 F.R.D. 474 (D. R.I. 1969); *United States* v. *Miller*, 9 F.R.D. 506 (M.D. Pa. 1949).

it is only when the reason advanced falls *completely* within the scope of those enumerated in Rule 60(b)(1) that relief is barred as untimely, if the motion is filed more than one year after judgment is entered. In view of the over-all objective of the Federal Rules to obtain at least some form of hearing on the merits and of the basic purpose of Rule 60(b) in particular to prevent injustice, we submit that the Ninth Circuit approach is clearly the better one, and we urge this Court to adopt it.

The District Court, sustained by the Fifth Circuit, asserted that petitioners' request for relief here was a "typical case of mistake and nothing more," and therefore that Rule 60(b)(6) was inapplicable. This ruling is clearly incorrect. As indicated in our Statement, there is nothing whatever "typical" about the situation in which petitioners became embroiled in this case, and much more than a mere "mistake" was involved. Petitioners' trial counsel was required to construe an ambiguous order of the Chief District Judge who was replaced two days after he entered that order by a newly-appointed associate District Judge. The interpretation of the order plaintiffs' counsel adopted was so plausible that both defense counsel and the newly-appointed District Judge assigned to hear the case concurred in the interpretation. When the order was first entered, it was not unreasonable to suppose that a District Judge might require all members of a class to be named as plaintiffs when the class was alleged to contain only 26 members[13]—particularly when doing so might be a

[13] FRCP Rule 23(a) requires that one of the prerequisites for maintaining a class action is that the "class is so numerous that joinder of all members is impracticable."

convenient means to resolve the existing dispute between the parties over which members of the class could or could not be contacted directly by defendants' attorneys.

Later, the second District Judge permitted an amendment to the complaints which showed that the class in reality contained over 1,500 members, but nevertheless entered an order dismissing the complaints with prejudice for failure to comply with the earlier order. He adhered to the order of dismissal despite the assurances of plaintiffs' counsel on oral argument that all class members who had formally retained his law firm were named as plaintiffs. Thus, plaintiffs' counsel reasonably concluded that the District Judge still felt that the order had not been complied with, because that judge construed the order to require the naming as plaintiffs of at least some additional members of the class (including the Florida companies) which had not yet been so named. Having immediately challenged the effect of this order as being grossly unfair after dismissal was entered, and having obtained no redress from the District Judge, plaintiffs appealed, but were met with a ruling by the Fifth Circuit that the *only* issue on appeal was whether the trial court properly dismissed under FRCP Rule 41(b) for failure to abide by an order that the *trial court* felt had not been complied with. When that appeal failed, and this Court denied certiorari, plaintiffs were faced with the question of whether there were any other conceivable means to obtain a trial on the merits of their $1,000,000 damage claim.

Since Rule 60(b) then appeared to be the proper and only vehicle to correct a manifestly unfair and inequitable result, counsel applied to the District Court

for relief under that rule, anticipating that the court would apply the rule in the humane spirit its drafters had envisioned[14] and other courts had chosen to do.[15] Neither the District Court nor the Fifth Circuit did so, thus reinforcing the conclusion expressed by an experienced state trial judge that in interpreting Rule 60(b), "some courts have mistakenly adopted a rule of strict construction contrary to the intent of the authors of this 'humane' rule."[16]

The District Court and the Fifth Circuit also offered dicta *in transitu* to the effect that relief under Rule 60(b)(6) would have been denied even had it been available. These dicta cannot be reconciled with holdings by many other courts that relief under Rule 60(b)(6) should be granted under circumstances even less compelling than those here.[17] For example, in *Patapoff* v. *Vollstedt's, Inc., supra,* a petition for involuntary bankruptcy was filed against Mrs. Patapoff. Her attorney advised both her and her husband to file an "Admission or Confession of Bankruptcy,"

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[14] Report of the Advisory Committee on the Federal Rules of Civil Procedure, May, 1954, page 55. "We suggest that it may be fairly concluded that the intent in adopting Rule 60(b) was to avoid the technicalities surrounding the 'ancient' common law and equitable remedies * * *." Wham, *Federal District Court Rule 60(b): A Humane Rule Gone Wrong,* 49 A.B.A. Journal 566 (1963).

[15] *E.g., Barber* v. *Turberville,* 94 U.S. App. D.C. 335, 218 F.2d 34 (1954); *Tazer* v. *Charles A. Krause Milling Co.,* 189 F.2d 242 (3d Cir. 1951); *United States* v. *Williams,* 109 F. Supp. 456 (W.D. Ark. 1952).

[16] Wham, *supra* note 14 at 567.

[17] *E.g., Patapoff* v. *Vollstedt's, Inc., supra; Kinnear Corp.* v. *Crawford Door Sales Co.,* 49 F.R.D. 3 (D. S.C. 1970). *See also* the other cases cited in note 12, *supra. Cf. Robins* v. *Pitcairn,* 3 Fed. Rules Serv. 601 (N.D. Ill. 1940).

assuring her that she and her husband "would be given an opportunity to be heard before the referee for the purpose of finally determining whether or not they were in fact bankrupts." This legal advice proved incorrect, and Mrs. Patapoff was adjudicated a bankrupt on the basis of her "Admission." She moved to set the judgment aside under Rule 60(b). The trial court denied the motion, but the Ninth Circuit reversed and directed that the judgment be vacated:

> Rule 60(b) is clearly designed to permit a desirable legal objective: that cases be tried on their merits.
>
> We need not here be concerned with whether the mistake under which appellant acted was a mistake of law, induced by the erroneous advice given her by the attorney. If we assume that the "mistake, inadvertence, surprise, or excusable neglect", listed in subdivision (1) of Rule 60(b) does not ordinarily apply where the mistake, inadvertence, etc. relates to a mistake of law, yet subdivision (6) provides that relief can be granted for "any other reason justifying relief from the operation of the judgment." [267 F.2d at 865.]

Although the Ninth Circuit had no difficulty granting relief to Mrs. Patapoff on these relatively simple facts, the Fifth Circuit would have us believe that the permanent loss of a $1,000,000 damage claim under the extraordinary circumstances of this case is not sufficiently "exceptional" to warrant relief under Rule 60(b)(6).

The District Court and the Fifth Circuit finally held that relief under Rule 60(b)(1) was barred as untimely. All parties concede that this holding is correct *if* the one-year limitations period of Rule 60(b)(1) began to run on the date of entry of the original order

dismissing *with* prejudice—July 13, 1967. The District Court conceded that the second order dismissing *without* prejudice "substantially" modified the first order, but nevertheless ruled that limitations began to run from the date of the first order.

Petitioners' research has disclosed no cases dealing with this question under Rule 60(b), other than the opinions below, and therefore it appears to be one of first impression and of obvious importance in this Court. Petitioners did cite to the courts below several cases holding that the time within which to appeal runs from the date of entry of a substantially modified order, not the date of entry of the original order.[18] But the District Court stated simply that these cases were "not authoritative since they deal with the time limit for appeals." We submit that our construction is more in keeping with the broad equitable purposes of Rule 60(b), and therefore that relief is warranted under Rule 60(b)(1).[19]

CONCLUSION

This Court has repeatedly emphasized that the Federal Rules are not a game—especially one designed to prevent a case from being heard. It has said, for example:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by

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[18] *E.g., Federal Trade Comm'n* v. *Colgate Palmolive Co.*, 380 U.S. 374 (1965); *Schramm* v. *Murdock-Salyer Chev. Co.*, 312 F.2d 249 (10th Cir. 1962).

[19] Many cases have granted relief under Rule 60(b)(1) on less compelling facts than those here. *E.g., Griffin* v. *Kennedy*, 120 U.S. App. D.C. 104, 344 F.2d 198 (1965); *Russell* v. *Cunningham*, 279 F.2d 797 (9th Cir. 1960); *cf. Fleming* v. *Huebsch Laundry Corp.*, 159 F.2d 581 (7th Cir. 1947).

> counsel may be decisive of the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. [*Conley* v. *Gibson*, 355 U.S. 41, 48 (1957); *accord: United States* v. *Hougham*, 364 U.S. 310, 317 (1960).]

Even a cursory reading of the opinions below, in light of the record facts, indicates that these liberal rules have been contorted. "Though the case has been shunted back and forth between the trial and appellate courts, it has not yet progressed beyond an exercise in pleading niceties." *Markert* v. *Swift & Co.*, 173 F.2d 517, 518 (2d Cir. 1949). Under these circumstances, "plaintiffs cannot properly be denied opportunity to present the case they believe they have." *Ibid.*

This is not a case where plaintiffs have slept on their rights and now belatedly seek assistance. Plaintiffs have vigorously and unceasingly been attempting to secure a trial on the merits of their claims for more than five years by:

—amending their complaints,

—seeking reconsideration of orders at the trial court level,

—seeking review by way of writ of prohibition and mandamus,

—appealing,

—requesting rehearings,

—requesting certiorari, and

—moving to amend the judgment.

If this Court denies certiorari, plaintiffs' final opportunity to litigate their $1,000,000 damage claim on the merits will have been extinguished.

Accordingly, this Court should grant certiorari, reverse the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, and remand this case to that court with directions to order the District Court to amend its judgment to permit petitioners to file amended complaints in the District Court.

Respectfully submitted,

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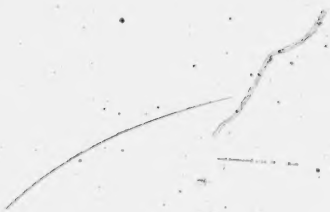
APPENDIX



APPENDIX A

Order

Filed Nov. 19, 1969.

(Title Omitted.)

This Cause is before the Court on the Joint Motion of Plaintiffs and Class Members for Relief of Judgments pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. The Court has heard argument of counsel and received Supplemental Memoranda of Law as requested by the Court.

The judgment that Plaintiffs seek relief from is an Order dismissing the Complaint dated July 12, 1967. The Complaint was dismissed pursuant to Rule 41(b) for failure to comply with an order dated September 14, 1966. The September Order was an attempt by this Court to perform a "housekeeping" operation with a view to determining whether the action was maintainable as a class action pursuant to Rule 23, as Amended. The July Order explicitly found that Plaintiffs had failed to comply with the September Order.

On appeal the Fifth Circuit reversed that part of the July Order that dismissed the cause with prejudice but affirmed as to the correctness of the dismissal. Transit Casualty Company, et al. v. Security Trust Company, et al. 396 F.2d 803 (5th Cir. 1968). Rehearing was denied with a Per Curiam opinion. 399 F.2d 665 (5th Cir. 1968). Therefore the case stands dismissed without the Court ever having had the opportunity to decide the maintainability of this suit as a class action.

Plaintiffs now seek to have the case reopened on the grounds that they misunderstood the import of the September Order. The misunderstanding arose from the use of the terms "retained" and "represented." However, if paragraph (1) of the September Order directing Plain-

tiffs to amend their Complaints is read in conjunction with the paragraph immediately before it, it becomes difficult to envision how Plaintiffs could have been confused. The Court, for the purpose of this motion, will accept without so finding that Plaintiffs were indeed confused.

This motion was brought under Rule 60(b)(6) on the ground of "other reasons justifying relief." The cases and legislative history hold that Rule 60(b)(6) is "mutually exclusive" of the other subdivisions of Rule 60(b) and in particular Rule 60(b)(1). Renieri [sic] v. News Syndicate Co., 385 F.2d 818 (2nd Cir. 1967). However, it seems that some Courts have invoked the broad equitable power of Rule 60(b)(6) so as to prevent "extreme hardship or injustice." Barron & Holtzoff (Wright Edition § 1330, p. 426. The situation here is not the type that justifies such an extreme exercise of discretion.

If Plaintiffs are entitled to relief it must come by virtue of Rule 60(b)(1). The pleadings indicate the typical case of mistake and nothing more. There is no allegation that the misunderstanding was created by either the Court, the Defendants or some other cause. It is purely and simply the mistake of Plaintiffs.

Rule 60(b)(1) must be brought within a reasonable time not to exceed one year from the date of the order from which relief is sought. Plaintiff feels that the time should run from the Order on Mandate dated September 10, 1968. It is asserted that the time runs from a substantive change in the order. The cases cited by Plaintiffs are not authoritative since they deal with the time limit for appeals. In fact, the case most strenuously urged by Plaintiff argues to the contrary result. Federal Trade Commission v. Minneapolis-Honeywell Regulater Company, 344 U.S. 206 (1952). The decision of the Fifth Circuit in the present case did cause a substantive change in that it reversed the dismissal "with prejudice." However, the aspect of the order that was so vitally important to Plaintiffs was

the dismissal itself. The complaint remained dismissed. As far as Plaintiffs stood they remained as they were at the time of the July Dismissal Order. It cannot be said that in context this was a substantial modification. The Court is compelled to the conclusion that it is the July Dismissal Order that Plaintiff seeks relief from and the time limit must run from that date unaffected by the Order on Mandate.

A reasonable time is usually construed as the time allowed for appeal. McDowell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962); 7 Moores [sic] Federal Practice, Para. 60.22[3] (2nd ed. 1955). However, the prosecution of an appeal does not bar the application to the District Court for relief pursuant to Rule 60(b). Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955). Plaintiff should have sought relief in this Court within one year of the Order of July 12, 1967. An appeal does not toll the one year time limit. Although the Petition for Rehearing had not been denied, the decision of the Fifth Circuit had been rendered leaving sufficient time to file the motion here under consideration which was filed July 1, 1969. It is therefore

Ordered and Adjudged that Plaintiffs' Motion for Relief Pursuant to Rule 60(b)(6) be treated as a motion pursuant to 60(b)(1) and as such be denied as being untimely filed.

Done and Ordered at Miami, Florida this 18th day of November, 1969.

C. Clyde Atkins,
United States District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 29145, 29146

TRANSIT CASUALTY COMPANY, ETC., ET AL.,
Plaintiffs-Appellants,

v.

SECURITY TRUST COMPANY, ETC., ET AL.,
Defendants-Appellees.

April 1, 1971

Before BELL, DYER and RONEY, Circuit Judges.

RONEY, Circuit Judge:

This is an appeal from an order of the District Court denying motions of plaintiffs for relief under Rule 60(b) of the Federal Rules of Civil Procedure. Finding no error in the District Court's holding that the motions were not timely filed, we affirm.

Although the point for review is narrow, some eulogy may be appropriate, inasmuch as our decision will apparently deal a fatal blow to a cause which set forth over four years ago to recover damages in excess of $1,000,000, has thrice visited this Court, knocked once on the door of the United States Supreme Court, had the attention of two experienced trial judges, and has not once been brought to court on the merits.

I.

In January, 1966, Transit Casualty Company, a Missouri corporation, and Charter National Insurance Company, an Arkansas corporation, filed two class actions seeking to recover trust funds which were allegedly dissipated by defendant, Security Trust Company, a Florida

corporation, through acts of negligence and constructive fraud in the management and operation of another Florida corporation, McKinley and Company. Defendant Security was executor and trustee of the estate of John E. McKinley, Jr., deceased, and as such was sole stockholder of McKinley and Company.[1] The thrust of the claim concerned alleged misappropriation of insurance premium trust funds. The complaints were filed for plaintiffs' own use and for the use of some twenty-four other named insurance companies, who were alleged to constitute a class.

On September 14, 1966, the District Court ordered the plaintiffs to "amend their complaints so as to include as parties plaintiff all members of the alleged class who have retained counsel for the plaintiffs to represent them in these two cases."[2] This Order has been the source of plaintiffs' problems throughout this case.

Initially troubled by the September Order, plaintiffs sought to set it aside by an application to this Court for a writ in the nature of prohibition and mandamus, which was denied on the ground that the District Court's

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[1] McKinley and Company was in state court receivership. The receiver and deputy receiver were named defendants in the suit.

[2] In June, 1966, defendant's attorney wrote letters to the insurance companies who were named plaintiffs as members of the class. The letters stated that the defendant had information that some members of the class had been named without their knowledge and consent, and inquired whether the respective company had given its consent to be so named. Plaintiffs' counsel, thereupon, sent a telegram to defendant's attorneys requesting them to stop communicating "with clients represented by their firm" in the lawsuit. The defendant's attorneys responded that they would do so if plaintiffs' attorneys would show them written authorizations from the class members or give assurances of representation sufficient to permit discovery from the corporate officials without service of a subpoena. The plaintiffs then filed a motion to enjoin and prohibit the defendant's attorneys from communicating with plaintiffs represented by plaintiffs' counsel. It was in this factual setting that the Order of September 14, 1966, was entered.

ruling was merely a "housekeeping" order, and was not subject to review at that stage of the proceeding. Transit Casualty Co. v. Atkins, 372 F.2d 441 (5th Cir. 1967). The plaintiffs then filed amended complaints naming a number of additional plaintiffs. On March 22, 1967, on defendant's motion the Court entered another order requiring the plaintiffs and their counsel to comply with the Court's September Order within 20 days. After extending the time an additional 30 days by stipulation, the defendant filed a motion to dismiss for failure to comply with the Order, on the ground that the attorneys for plaintiffs had claimed to represent three Florida corporations and they were not joined as plaintiffs. On July 13, 1967, the District Court dismissed the complaints with prejudice finding that plaintiffs had not complied with the Order of September 14, 1966. The dismissal was affirmed on appeal, with the modification that it be without prejudice. Transit Casualty Co. v. Security Trust Co., 396 F.2d 803 (5th Cir. 1968), reh. den. 399 F.2d 665 (1968), cert. den. 393 U.S. 1024, 89 S.Ct. 635, 21 L.Ed. 568 (1969). Pursuant to the mandate, the District Court entered an order dismissing the cases without prejudice on September 10, 1968.

II.

On April 24, 1969, the plaintiffs served motions[2a] for relief under Rule 60(b)(6), F.R.Civ.P., asking the court to vacate its dismissal without prejudice and re-enter the judgments with leave to file amended complaints.[3] The

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[2a] Although motions were filed in each case, for the sake of clarity they will be discussed hereafter as a single motion and our discussion is equally applicable to both cases.

[3] The records of the District Court show the motion as being filed on July 1, 1969, and the District Court in its Order denying the motion recognized that date as the filing date. The plaintiffs contend that the date is erroneous and point to the date of service, April 24, 1969, as being correct. The discrepancy in the dates is immaterial to our decision in this matter.

motion was based on an alleged misunderstanding of the import of the Order of September, 1966, with respect to the phrase "to include as parties plaintiff all members of the alleged class who have retained counsel for the plaintiffs to represent them in these two cases." The plaintiffs contend that the Order had actually been complied with at the time that the court dismissed the case for lack of compliance, that the court would not have entered the dismissal had it known the true facts contained in the record, and that it should relieve the plaintiffs from the error by granting them leave to file amended pleadings and thus further maintain this action.

This appeal deals exclusively with the alleged error of the District Court in dismissing the motion as being untimely.

III.

The first question is the determination of the date from which to measure the timeliness of plaintiffs' motion. The original order of dismissal was entered on July 12, 1967. Clearly the time for relieving the plaintiffs from that dismissal was the date of its entry, unless some rule of law or procedure extended the time.

[1-4] Although plaintiffs appealed from the order of dismissal, such appeal does not toll the time for making a 60(b) motion. This is because such motion can be made even though an appeal has been taken and is pending. Corn v. Guam Coral Co., 318 F.2d 622 (9th Cir. 1963); Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955); 7 Moore, Federal Practice, § 60.28[2] (2d Ed. 1970). If the appeal results in a substantive change, then the time would run from the substantially modified order entered on mandate of the appellate court. Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952). The decision of our Court on the appeal did not cause a substantive change in that

the dismissal was merely changed to be without prejudice. As far as this suit was concerned, after the entry of the order on the mandate on September 10, 1968, the plaintiffs stood in the exact position as they did on July 12, 1967. As far as their claim was concerned, the appeal determined that the dismissal would not act as a bar to another suit in this or another forum, but as to pursuing the cause of action in this suit, the complaint remained dismissed. Changing a dismissal with prejudice to a dismissal without prejudice is not such a substantial substantive change as to renew the right of plaintiffs to bring a motion for relief under Rule 60(b), F.R.Civ.P., or extend their time for filing such a motion.

The District Court correctly held that the time for bringing the 60(b) motion for relief from the dismissal of the complaint began on July 12, 1967.

IV.

The District Court treated plaintiffs' motion as having been brought under Rule 60(b)(1). As such it was clearly untimely because the rule specifically provides that such motions must be made "not more than one year after the judgment, order or proceeding was entered or taken." Even using plaintiffs' date of service of April 24, 1969, the motion was filed over a year and nine months after July 12, 1967, and could not be considered by the court under Rule 60(b)(1).

V.

The final question then is whether the District Court properly treated the motion as being brought under Rule 60(b)(1) rather than under 60(b)(6) as designated by plaintiffs. The difference could be significant because while one year absolutely bars the 60(b)(1) motion, the 60(b)(6) motion can be made within a reasonable time, which plaintiffs argue could extend more than one year.

Rule 60(b), Federal Rules of Civil Procedure, provides as follows:

> "*Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * * "

[5] The motion was based on an alleged misunderstanding of the import of the Order of September 14, 1966, with respect to the phrase "all members of the alleged class who have retained counsel for the plaintiffs to represent them in these two cases." The misunderstanding results from the words "retained" and "represent." Although the plaintiffs have continuously stated that they *represent* all members of the class, including the Florida companies, which were not joined, they allege that they were *retained* only by the original plaintiffs. Therefore, they contend, the Order of September, 1966, was complied with since all members of the class who retained them were joined as plaintiffs, and thus the dismissal for failure to comply with the Order was erroneous.

We agree with the District Court that this is a typical case of mistake and nothing more. "Mistake," which as a common word should be given its common meaning, means to misunderstand the meaning or intention of something, or to misinterpret it. The misunderstanding as to the distinction between "retained" and "represented"

falls squarely within the definition of "mistake."[4] Gila River Ranch, Inc. v. United States, 368 F.2d 354 (9th Cir. 1968).

It makes no difference whether the case was dismissed because the plaintiffs mistakenly thought they had complied with the Order, when in fact they had not, or because the court mistakenly thought they had not complied with the Order, when in fact they had. The ground for relief, if it were to be granted, would be that provided for by "mistake" in Rule 60(b)(1).

VI.

[6] Rule 60(b)(1) and Rule 60(b)(6) are not *pari passu* and are mutually exclusive. Rinieri v. News Syndicate Co., 385 F.2d 818 (2d Cir. 1967); 7 Moore, Federal Practice, ¶ 60.27[1] (2d Ed. 1970). The reason for relief set forth in Rule 60(b)(1) cannot be the basis for relief under Rule 60(b)(6).

Nevertheless, the District Court further considered whether any other reasons brought plaintiffs within the broad equitable power of Rule 60(b)(6), which could be invoked to prevent extreme hardship or injustice. Barron & Holtzoff (Wright Edition) § 1330, p. 426 (1958). The Court determined that "the situation here is not the type that justifies such an extreme exercise of discretion." Our review of the record reveals no other reasons which would compel the court to exercise its discretion in granting relief or would show any abuse of discretion in denying relief.

Affirmed.

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[4] Although contending that these circumstances were something other than "mistake," the plaintiffs' brief continually referred to the matter in terms of mistake. Thus, they used the following phrases: "mistaken conclusion of the counsel," "mistakenly believed by counsel," "plaintiffs' counsel mistakenly maintained," "mistaken representation by counsel," "plaintiffs' counsel mistakenly informed the court that the September order required joinder of all members of the class." The synonyms "misunderstanding" and "misinterpretation" were also regularly used in the brief.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 29145 and 29146

TRANSIT CASUALTY COMPANY, ETC., ET AL.,
Plaintiffs-Appellants,

v.

SECURITY TRUST COMPANY, ETC., ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Apr. 1, 1971, 5 Cir., 1971, ——F.2d——).

(May 28, 1971)

Before BELL, DYER and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

SUPREME COURT, U. S.

SEP 4 1971

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-228

TRANSIT CASUALTY COMPANY, ET AL.,
Petitioners,

vs.

SECURITY TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENT SECURITY TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1971

No. 71-228

TRANSIT CASUALTY COMPANY, ET AL.,
Petitioners,

vs.

SECURITY TRUST COMPANY, ET AL.,
Respondents.

BRIEF OF RESPONDENT SECURITY TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion here sought to be reviewed is reported at 441 F.2d 788. Its subsequent Order on Petition for Rehearing and Petition for Rehearing En Banc is unreported but reproduced as Appendix C to the petition for a writ of certiorari. The order of the United States District Court for the Southern District of Florida which was affirmed below is unreported but reproduced as Appendix A to the petition for a writ of certiorari. The foregoing opinions were rendered in the present Rule 60(b) proceedings.

Before the Rule 60(b) proceedings were commenced, there were prior opinions rendered and reported in the causes at 372 F.2d 441; 396 F.2d 803; and 399 F.2d 665, cert. den. 393 U.S. 1024.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The original opinion of the Court of Appeals is dated April 1, 1971. Petitioners' timely petition for rehearing was denied on May 28, 1971.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the district court's finding and holding that petitioners' motions for relief under Rule 60(b) were not timely filed when:

1. The motions were filed on July 1, 1969, and alleged a "typical case of mistake and nothing more" within the meaning of Rule 60(b)(1); and

2. The motions sought relief from prior dismissals of the causes without prejudice for failure to obey a court order which had the following procedural history:

   a. On July 12, 1967, the causes were dismissed with prejudice by the district court for failure to obey a court order;

   b. On appeal, the dismissals were affirmed but modified so as to be without prejudice. The Court of Appeals' original opinion was rendered on June 28, 1968; and its opinion on rehearing was rendered on August 29, 1968.

   c. On September 10, 1968, the district court entered an order dismissing the causes without prejudice in accordance with the appellate mandate.

   d. On January 13, 1969, this Court denied certiorari?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 60 provides:

"(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should

have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF THE CASE

Petitioners, as plaintiffs below, filed two suits in the United States District Court for the Southern District of Florida (R. 12-75, 261-284)*. The complaints sought to recover damages from the respondent, Security Trust Company, because of the latter's alleged mismanagement

*"R" refers to the printed record used on both appeals in the Court of Appeals below. "A" refers to the printed Joint Appendix used in the second appeal below.

of McKinley & Company. McKinley & Company was alleged to have gone insolvent after entering into separate management agreements to act as manager for various insurers in the writing of certain types of insurance.

The named plaintiffs in each case were foreign insurance companies authorized to do business in Florida. In each case, plaintiffs sued "to their own use and to the use of" certain other insurers similarly situated (R. 12-13, 261-262). After some preliminary procedural sparring had occurred, the district court entered an order on September 14, 1966, which provided in pertinent part:

> "1. Plaintiffs shall within ten (10) days hereafter amend their complaints so as to include as parties Plaintiff all members of the alleged class who have retained counsel for the Plaintiffs to represent them in these two cases." (R. 179).

Events Leading Up To Order Of September 14, 1966

The events leading up to the order of September 14, 1966, are shown at R. 76-175. These events are fairly summarized in **Transit Casualty Company v. Atkins, (5th** Cir. 1967), 372 F.2d 441, 441442, where the Court of Appeals declined interlocutory review of the order, stating:

> "The facts underlying both of these proceedings are: The complaints were brought by two named parties plaintiff and seek damages against Security Trust Company, not only for themselves, but presumably for the benefit of 24 other insurance companies allegedly similarly situated.

The complaints did not state in what way the class members were so numerous that joinder of all was impracticable; nor was it alleged what questions of law or fact were common as between the defendant, Security Trust Company, and all the quasi plaintiffs; nor was it shown how a class action was superior to other available methods for the fair and efficient adjudication of the controversy. Security Trust, in its answers, specifically denied all allegations as to the alleged class claimed to be represented; denied that it was impracticable to bring all of the alleged members of the class before the court; and denied that the two party plaintiffs fairly represented the interests of the entire class. In the course of discovery, after answers were filed, the attorneys for Security communicated by letter with some of the 24 absent members of the alleged class seeking information as to their knowledge of having been named as members. The communications also concerned the taking of discovery depositions. Thereupon, the attorneys for the plaintiffs notified Security's counsel to cease and desist communicating directly or indirectly with the clients represented by them. They filed before the district judge a motion to enjoin and prohibit any such communication, and in that motion charged counsel for defendant with unethical conduct in attempting to communicate directly with the absent members of the class. Presented with a claim by the attorneys for the plaintiffs that the attorney-client relationship existed between them and the non-

party class members, and a charge of unethical conduct leveled at counsel for defendant, the Court had the problem of determining the jural relationship of the members of the class, not only to the plaintiffs but to each other, and to the subject matter of the litigation, as well as to the counsel for plaintiffs. In an apparent effort to assemble information to assist him in determining these relationships, the District Judge entered the order of September 14th. Plaintiffs argue that the writs should issue because the order requires the joinder of additional plaintiffs who are residents of the same state as the defendants, and that this will destroy diversity and will divest the federal court of jurisdiction.

Irrespective of the correctness of the order below, it is apparent that this case is not in an appropriate stage for appellate review. The District Court is in the middle of a housekeeping operation. It has not reached a determination of the merits in any respect, and the order here sought to be reviewed does not define the rights of any party. It is not clear what the precise effect of the order will be on the outcome of the litigation, nor what subsequent decree, either dismissing the case or permitting them to proceed as a class action, will define their rights. . . . "

District Court Proceeding After Denial of Interlocutory Appellate Review

After the Court of Appeals held it had no jurisdiction to review the interlocutory order, the district court granted petitioners additional time to comply with the order (R. 185-186). Finally, on May 9, 1967, petitioners amended their complaints in supposed compliance with the September 14th order, but merely added certain foreign corporations as named plaintiffs and named none of the Florida corporations they admittedly represented (R. 221-223). To add insult to injury, plaintiffs' counsel filed an affidavit to the effect that the Florida members of the class had "elected to remain in that capacity" (R. 228).

The Dismissal With Prejudice for Failure to Obey The Court's Order

The district court's Order of Dismissal provides in pertinent part as follows:

> " . . . 2. Notwithstanding the granting of two continuances to the plaintiffs to comply with the order of September 14, 1966, plaintiffs, in the opinion of this Court, have failed to comply therewith. The Amendment to the Complaint filed on May 9, 1967 in an effort to comply with the order of September 14, 1966, conspicuously fails to include three Florida corporations which the plaintiffs have represented to this Court, as well as the Appellate Court—the Fifth Circuit Court of Appeals—to comprise members of

the alleged class which must be named pursuant to the Order of September 14, 1966, since they were legally represented by counsel for the plaintiffs. As argued by counsel for the defendant, a failure to name these corporations constitutes a failure to comply with the order of September 14, 1966.

3. This Court expressly notes that at the time of the hearing on this motion no determination had been made as to whether this action is properly maintainable as a class action. In this regard, the posture of this case at the time of the hearing was the same as when the order of September 14, 1966 was entered. This Court, then, as now, as noted by the Fifth Circuit Court of Appeals, was engaged in a 'housekeeping' operation with a view to determining whether this action is properly maintainable as a class action. A full and good faith compliance with the order of September 14, 1966 was also necessary in order for this Court to determine the jural relationships of all interested parties among themselves as well as their relationship to the subject matter of the litigation and discovery processes incident thereto.

4. The Amendment together with counsel's affidavit of compliance does not respond to the Court's order of September 14, 1966 and instead of facilitating a disposition of the matters set forth in the complaint it serves to frustrate and hamper this Court's effort to resolve the pertinent issues.

5. The Court expressly finds that the plaintiffs have failed to comply with the order of September 14, 1966 as they were ordered to do. It Is Therefore, Ordered And Adjudged, that this cause be and the same is hereby dismissed with prejudice pursuant to Rule 41(b) and that the Defendant, Security Trust Co. go hence without day with its costs as may hereafter be taxed upon motion. . . . " (R. 229-231).

Court of Appeals' Ruling That Dismissal Should Be Without Prejudice

In its initial opinion at 396 F.2d 803, the Court of Appeals states:

". . . We agree with the order of dismissal by the district court, but vacate that part of the order making the dismissal with prejudice and remand with instructions to enter the order without prejudice."

In its Order on Petition for Rehearing at 399 F.2d 665, the Court of Appeals states:

" . . . For rehearing, appellants urge two principle points, both of which deal again with the merits or demerits of the District Court's order in attempting to define the parties to be included within the appellants' class action. Again appellants overlook that really the only issue on appeal is the compliance vel non with the District Court's order of September 14, 1966, and,

having found a failure of compliance on the part of appellants, the District Court's judgment of dismissal was affirmed with directions that the order be entered without prejudice as set out in our Per Curiam of June 28, 1968. This Court will not modify its previous ruling despite any Florida law claimed by appellants which may or may not bar a subsequent cause of action in any future suit. . . ."

Entry of Order On Mandate and Denial of Certiorari

The Court of Appeals' denial of the petition for rehearing on August 29, 1968, was followed on September 10, 1968, by the district court's entry of a dismissal without prejudice in accordance with the appellate mandate (A. 333-334). Thereafter, on January 13, 1969, this Court denied certiorari. 393 U.S. 1024.

Rule 60 Proceeding In District Court

On June 24, 1969, over six months after the Court's denial of certiorari, the Court of Appeals granted petitioners leave to file a Rule 60 motion stating:

"... However, the granting of this leave to file said motion is not to be construed for or against the merits of the plaintiffs' Rule 60 motion." (A. 338).

On July 1, 1969, petitioners filed their Rule 60 motion in the district court which was styled "Joint Motion for Plaintiffs and Class Members for Relief of Judg-

ments, Pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure." (A. 340-345). In their joint motion, petitioners requested that the dismissal without prejudice be vacated so that dismissals without prejudice "and with leave to file amended complaints" could be entered (A. 345).

In Paragraph 7 of the Joint Motion, petitioners explained their failure to comply with the September 14th order and their grounds for vacating the prior dismissal without prejudice as follows:

> "7. The circumstances leading to the order of dismissal of July 12, 1967 involved the failure of plaintiffs to join as parties four Florida corporations whose joinder would have concomitantly destroyed diversity and federal jurisdiction. The failure to join the Florida companies arose from a bona fide misunderstanding of the order of September 14, 1966 and a procedural anomaly occasioned by the July 1, 1966 amendment to Rule 23 altering the character of these actions (which had originally been filed as class actions determinable from the face of the pleadings) so as to render them without classification until an order of Court, pursuant to Rule 23(c)(1) had been entered. The order of September 14 admits of two interpretations and the interpretation taken by counsel for the plaintiffs was that all members of the class were required to be joined as parties, pursuant to paragraph 1 of said order. The decharacterization effect of the July 1 amendment to Rule 23 was such that

> the amendment to the complaints, which counsel believed to be required by paragraph 1 of the September 14 order, would have defeated federal jurisdiction in a manner inconsistent with the applicable provisions of Rule 19 and 20. Thus, counsel in an attempt to preserve federal jurisdiction was caught in the cross-fire of confusion between Rule changes and an order of this Court which seemingly embraced elements of both the old and the amended Rule. . . . " (A. 342).

Two weeks later, petitioners' counsel filed a memorandum in support of the joint motion in which they expanded the grounds for relief by claiming that they had in fact complied with the September 14th order because they had actually not been "retained" by the Florida corporations they failed to name as plaintiffs (A. 353-356). As noted, **supra**, the district court found to the contrary when it entered the initial dismissal with prejudice (A. 229-231); and its finding in this respect was affirmed by the Court of Appeals on the prior appeal.

The prior findings that petitioners did not comply with the September 14th order could have come as no surprise since they had previously admitted that the order required them to name the Florida corporations as plaintiffs. Thus, petitioners' counsel admitted in the district court that:

> "Furthermore, three of the corporations that we do represent are Florida corporations. One of them is General Guaranty of Orlando. The full name of that corporation is General Guar-

> anty Insurance Company of Orlando. Three of the corporations that are Florida corporations that we represent are General Guaranty Insurance Company of Winter Park, Florida; American Fire and Casualty Company of Orlando; and Carolina Casualty Company of Jacksonville, Florida." (R. 253. Cf. 229-230).

Moreover, in their "Brief of Petitioner" before the Court of Appeals in the prior mandamus and prohibition proceedings, petitioners stated:

> "On September 14, 1966 the trial court sua sponte entered an order requiring that the complaint be amended so as to add as additional parties plaintiff all members of the class who have retained counsel for the plaintiffs to represent them in the case. (Exhibit C). It is undisputed that four (4) of the companies whose joinder would be required under this ruling are Florida corporations. (Exhibit F). The defendants likewise are Florida residents." (Brief For Petitioner, p. 2).

On November 19, 1969, the district court denied the Rule 60 motions as untimely filed (A. 448-450). The district court found that, "The pleadings indicate the typical case of mistake and nothing more." (A. 449). In finding and holding that the motions were untimely, the district court reasoned as follows:

> "Rule 60(b)(1) must be brought within a reasonable time not to exceed one year from the date of the order from which relief is sought. Plain-

tiff feels that the time should run from Order on Mandate dated September 10, 1968. It is asserted that the time runs from a substantive change in the order. The cases cited by Plaintiffs are not authoritative since they deal with the time limit for appeals. In fact, the case most strenuously urged by Plaintiff argues to the contrary result. Federal Trade Commission v. Minneapolis- Honeywell Regulater Company, 344 U.S. 206 (1952). The decision of the Fifth Circuit in the present case did cause a substantive change in that it reversed the dismissal 'with prejudice.' However, the aspect of the order that was so vitally important to Plaintiffs was the dismissal itself. The complaint remained dismissed. As far as Plaintiffs stood they remained as they were at the time of the July Dismissal Order. It cannot be said that in context this was a substantial modification. The Court is compelled to the conclusion that it is the July Dismissal Order that Plaintiff seeks relief from and the time limit must run from that date unaffected by the Order on Mandate.

A reasonable time is usually construed as the time allowed for appeal. McDowell v. Celebrezze, 210 F.2d 43 (5th Cir. 1962); 7 Moores Federal Practice, Para. 60.22[3] (2nd ed. 1955). However the prosecution of an appeal does not bar the application to the District Court for relief pursuant to Rule 60(b). Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955). Plaintiff should have sought relief in this Court within

one year of the Order of July 12, 1967. An appeal does not toll the one year time limit. Although the Petition for Rehearing had not been denied, the decision of the Fifth Circuit had been rendered leaving sufficient time to file the motion here under consideration which was filed July 1, 1969. It is therefore

Ordered and Adjudged that Plaintiffs' Motion for Relief Pursuant to Rule 60(b)(6) be treated as a motion pursuant to 60(b)(1) and as such be denied as being untimely filed. . . . " (A. 450).

Opinion of Court of Appeals Below

In affirming the district court, the Court of Appeals agreed "with the District Court that this is a typical case of mistake and nothing more." 441 F.2d at 792. Having so agreed, the Court of Appeals concurred in the district court's findings and holding that the motions were not filed within the one year period prescribed in Rule 60(b)(1) saying at 441 F.2d 791:

"Although plaintiffs appealed from the order of dismissal, such appeal does not toll the time for making a 60(b) motion. This is because such motion can be made even though an appeal has been taken and is pending. Corn v. Guam Coral Co., 318 F.2d 622 (9th Cir. 1963); Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955); 7 Moore, Federal Practice, § 60.28[2] (2d Ed. 1970). If the appeal results in a substantive change, then

the time would run from the substantially modified order entered on mandate of the appellate court. Federal Trade Commission v. Minneapolis-Honeywell Co., 344 U.S. 206, 72 S.Ct. 245, 97 L.Ed. 245 (1952). The decision of our Court on the appeal did not cause a substantive change in that the dismissal was merely changed to be without prejudice. As far as this suit was concerned, after the entry of the order on the mandate on September 10, 1968, the plaintiffs stood in the exact position as they did on July 12, 1967. As far as their claim was concerned, the appeal determined that the dismissal would not act as a bar to another suit in this or another forum, but as to pursuing the cause of action in this suit, the complaint remained dismissed. Changing a dismissal with prejudice to a dismissal without prejudice is not such a substantial substantive change as to renew the right of plaintiffs to bring a motion for relief under Rule 60(b), F.R. Civ.P., or extend their time for filing such a motion.

The District Court correctly held that the time for bringing the 60(b) motion for relief from the dismissal of the complaint began on July 12, 1967."

REASONS FOR DENYING THE WRIT

1. Petitioners concede at page 22 of their petition that there is no decision in conflict with the holding below that the Rule 60(b)(1) one year time period was not tolled by the subsequent appellate proceedings. What little authority there is, is in accord with the holding below. **Corn v. Guam Coral Company** (9th Cir. 1963), 318 F.2d 622, 629; **Nyssonen v. Bendix Corporation** (1st Cir. 1966), 356 F.2d 193, cert.den. 385 U.S. 846; 7 Moore's Federal Practice, § 60.28(2), p. 320, fn. 37.

2. The decision below is correct and in probable accord with this Court's prior decisions. See, **Federal Trade Commission v. Minneapolis-Honeywell R. Co.**, 344 U.S. 206.

3. Since both courts below found and held that petitioners' motions presented a typical case of mistake and nothing more, the record raises no issue concerning what result should obtain when a motion for relief also presents "any other reason" within the meaning of Rule 60(b)(6). Indeed, the concluding paragraph of the Court of Appeals opinion below states:

> "Nevertheless, the District Court further considered whether any other reasons brought plaintiffs within the broad equitable power of Rule 60(b)(6), which could be invoked to prevent extreme hardship or injustice. Barron & Holtzoff (Wright Edition) § 1330, p. 426 (1958). The Court determined that 'the situation here is not the type that justifies such an extreme

exercise of discretion.' Our review of the record reveals no other reasons which would compel the court to exercise its discretion in granting relief or would show any abuse of discretion in denying relief." 441 F.2d at 792.

4. Even if petitioners' motions are treated as arising under Rule 60(b)(6), it is clear that they were not made "within a reasonable time". The motions were made two years after the original dismissal; more than a year after the Court of Appeals' first opinion on appeal; and six months after this Court's denial of certiorari. During the entire time, the only thing that happened was that petitioners were told again and again by one court after another that their cases were properly dismissed for failure to obey a court order. Cf. **Goldfine v. United States** (1st Cir. 1964), 326 F.2d 456; **McDowell v. Celebrezze** (5th Cir. 1962), 310 F.2d 43; 7 Moore's Federal Practice, § 60.22(3), p. 238.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that in accordance with Supreme Court Rule 33, true copies of the foregoing were mailed on this ____ day of September, 1971, to the following counsel of record:

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